

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CYNTHIA D. FAULKNER,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting

Commissioner of Social Security,

Defendant.

No. 14-cv-3040-JPH

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 14, 19. The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the parties' briefs, the court **grants** plaintiff's motion for summary judgment, **ECF No. 14**.

**JURISDICTION**

Faulkner protectively applied for supplemental security income (SSI) benefits May 26, 2010. She alleged onset beginning January 29, 2009 (Tr. 154-58). Benefits were denied initially and on reconsideration (Tr. 109-113, 122-23). ALJ Moira Ausems held a hearing May 3, 2012 (Tr. 55-83) and issued an unfavorable decision July 23, 2012 (Tr. 28-41). The Appeals Council denied review January

1 31, 2014 (Tr. 1-6). The matter is now before the Court pursuant to 42 U.S.C. §  
2 405(g). Plaintiff filed this action for judicial review March 31, 2014. ECF No. 1  
3 and 4.

#### 4 **STATEMENT OF FACTS**

5 The facts have been presented in the administrative hearing transcript, the  
6 ALJ's decision and the briefs of the parties. They are only briefly summarized as  
7 necessary to explain the court's decision.

8 Faulkner was 23 years old when she applied for benefits and 25 at the  
9 hearing. [The ALJ declined reopening a prior application that was denied and not  
10 appealed. Tr. 28.] Faulkner was in special education classes from preschool  
11 through high school. On her only job she worked eight to twelve hours a week as a  
12 child care aide. She alleges disability based on physical and mental limitations.  
13 These include infantile cerebral palsy with weak ankles and wrists, migraines,  
14 eczema, anxiety and problems with understanding and memory. She has been  
15 diagnosed with borderline intellectual functioning (BIF). (Tr. 40, 68, 86, 167, 174-  
16 75, 179-80, 209, 217, 260, 266, 270).

#### 16 **SEQUENTIAL EVALUATION PROCESS**

17 The Social Security Act (the Act) defines disability as the "inability to  
18 engage in any substantial gainful activity by reason of any medically determinable  
19 physical or mental impairment which can be expected to result in death or which

1 has lasted or can be expected to last for a continuous period of not less than twelve  
2 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
3 plaintiff shall be determined to be under a disability only if any impairments are of  
4 such severity that a plaintiff is not only unable to do previous work but cannot,  
5 considering plaintiff’s age, education and work experiences, engage in any other  
6 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423  
7 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both  
8 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
9 (9<sup>th</sup> Cir. 2001).

10 The Commissioner has established a five-step sequential evaluation process  
11 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
12 one determines if the person is engaged in substantial gainful activities. If so,  
13 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
14 decision maker proceeds to step two, which determines whether plaintiff has a  
15 medically severe impairment or combination of impairments. 20 C.F.R. §§  
16 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe  
17 impairment or combination of impairments, the disability claim is denied.

18 If the impairment is severe, the evaluation proceeds to the third step, which  
19 compares plaintiff’s impairment with a number of listed impairments  
acknowledged by the Commissioner to be so severe as to preclude substantial

1 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.  
2 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
3 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
4 not one conclusively presumed to be disabling, the evaluation proceeds to the  
5 fourth step, which determines whether the impairment prevents plaintiff from  
6 performing work which was performed in the past. If a plaintiff is able to perform  
7 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
8 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity  
9 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and  
10 final step in the process determines whether plaintiff is able to perform other work  
11 in the national economy in view of plaintiff's residual functional capacity, age,  
12 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
13 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

14 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
15 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
16 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
17 met once plaintiff establishes that a physical or mental impairment prevents the  
18 performance of previous work. The burden then shifts, at step five, to the  
19 Commissioner to show that (1) plaintiff can perform other substantial gainful  
activity and (2) a "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

## 2 STANDARD OF REVIEW

3 Congress has provided a limited scope of judicial review of a  
 4 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the  
 5 Commissioner's decision, made through an ALJ, when the determination is not  
 6 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,  
 7 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
 8 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be  
 9 upheld if the findings of fact are supported by substantial evidence." *Delgado v.*  
 10 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g). Substantial  
 11 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
 12 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
 13 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence "means such evidence  
 14 as a reasonable mind might accept as adequate to support a conclusion."  
 15 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch  
 16 inferences and conclusions as the [Commissioner] may reasonably draw from the  
 17 evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir.  
 18 1965). On review, the Court considers the record as a whole, not just the evidence  
 19 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980).

1 It is the role of the trier of fact, not this Court, to resolve conflicts in  
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
3 interpretation, the Court may not substitute its judgment for that of the  
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
6 set aside if the proper legal standards were not applied in weighing the evidence  
7 and making the decision. *Browner v. Secretary of Health and Human Services*, 839  
8 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
9 administrative findings, or if there is conflicting evidence that will support a  
10 finding of either disability or nondisability, the finding of the Commissioner is  
11 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

### 12 **ALJ'S FINDINGS**

13 At step one, ALJ Ausems found Faulkner did not work at SGA levels after  
14 she applied for benefits (Tr. 30). At steps two and three, she found Faulkner suffers  
15 from mild cerebral palsy and borderline intellectual functioning, impairments that  
16 are severe but do not meet or medically equal a listed impairment (Tr. 30, 33). The  
17 ALJ found Faulkner can perform a range of sedentary work, limited to standing  
18 and/or walking 4 hours in an 8-hour day, simple, routine tasks, superficial contact  
19 with the public and no more than cooperative teamwork with coworkers (Tr. 35).  
At step four, the ALJ found Faulkner has no past relevant work (Tr. 40). At step

1 five, she relied on the VE's testimony and found there are jobs Faulkner can  
2 perform, such as final assembler, charge account clerk and document preparer (Tr.  
3 40-41). The ALJ concluded Faulkner was not disabled after May 26, 2010 (Tr. 41).

#### 4 **ISSUES**

5 Faulkner alleges the ALJ should have found her impairments met or equaled  
6 the listing for cerebral palsy. She alleges the ALJ improperly rejected a treatment  
7 provider's opinion, erred when she failed to weigh lay testimony, assessed  
8 credibility and failed to include all limitations at step five. ECF No. 14 at 6-7. The  
9 Commissioner asks the Court to affirm, asserting the ALJ properly weighed the  
10 evidence and committed no harmful error. ECF No. 19 at 21.

11 Faulkner is correct that the ALJ's decision contains harmful error.

#### 12 **DISCUSSION**

##### 13 *A. Step Three*

14 Faulkner alleges the ALJ should have found at step three that her  
15 impairments met or equaled listing 11.07 (Cerebral Palsy). ECF No. 14 at 9-10; 20  
16 C.F.R., Subpart P, Appendix 1. The Commissioner responds that the ALJ's finding  
17 was appropriate and supported by substantial evidence. ECF No. 19 at 6-8.

18 Faulkner states medical expert James Haynes, M.D., testified it was  
19 "borderline" whether she met Listing 11.07; he acknowledged that if Faulkner  
experienced migraines at least fairly frequently and functioned intellectually at the

1 borderline level, the argument could be made that her impairments equaled the  
2 listing. ECF No. 14 at 9, referring to Tr. 64. Faulkner alleges this testimony, in  
3 addition to evidence of cerebral palsy, migraines, severe eczema, bilateral ankle  
4 weakness and BIF, shows her impairments met or equaled Listing 11.07. ECF No.  
5 14 at 9-10, citing to Tr. 263, 270, 331.

6 The Commissioner reads Dr. Haynes' testimony differently. She asserts his  
7 meaning is that this case was "very borderline" to even suggest a listing. She  
8 alleges that Dr. Haynes assessed RFC shows he did not believe a listing was met or  
9 equaled. ECF No. 19 at 6-7.

10 The Court agrees with Faulkner's interpretation. It appears Dr. Haynes  
11 meant this case was close to meeting Listing 11.07 based on Faulkner's  
12 combination of impairments.

13 The record indicates Faulkner was observed to have difficulty with balance  
14 when walking and walked with a wide gait. At times both ankles had mild limited  
15 range of motion with weakness (Tr. 262-63). She has been diagnosed with  
16 borderline intellectual functioning (BIF). Pace is noted to be slower than average  
17 (Tr. 268, 270, 337). The record shows the Administration has described Faulkner  
18 as delayed in answering questions and "had difficulty answering questions" (Tr.  
19 164-65). In addition, she suffers occasional migraines and eczema, the latter  
limiting her ability to perform certain job functions. She is noted to be "quite



1 childlike in her mannerisms” and “developmental delay features are evident” (Tr.  
2 74, 189, 260, 266, 321, 349-54).

3 The ALJ found at step two that Faulkner suffers from cerebral palsy and  
4 borderline intellectual functioning.

5 Symptoms of cerebral palsy include difficulty walking, such as a wide gait.  
6 People with CP may also have intellectual disabilities. *See e.g.*,  
7 [www.mayoclinic.org/](http://www.mayoclinic.org/). On this record the Court is unable to clearly determine  
8 whether the impairment of cerebral palsy with BIF meets or medically equals  
9 Listing 11.07. On remand a medical expert should be consulted to help make this  
10 determination.

11 *B. Weighing treating doctor’s opinion*

12 Faulkner alleges the ALJ’s reasons for rejecting the opinion of treating  
13 doctor, Wendy Owens, M.D., are inadequate. ECF No. 14 at 10-13. Dr. Owens  
14 opined Faulkner’s generalized weakness and cognitive impairment precluded  
15 gainful employment (Tr. 328, 331, 334, 337).

16 The Commissioner responds that the ALJ gave specific, legitimate reasons  
17 supported by substantial evidence for discrediting Dr. Owens’ opinion.

18 Dr. Owens opined Faulkner was unable to work due to a combination of  
19 physical and mental impairments. In April 2011 she opined generalized weakness  
and cognitive impairments preclude employment. Dr. Owens noted Faulkner had

1 been unable to pass the driving exam and has problems focusing and following  
2 directions (Tr. 328-29). In February 2012 she opined Faulkner is unable to work  
3 and Owens believed the condition would worsen. She opined standing and walking  
4 were both limited to two hours a day (Tr. 334). In May 2012 she opined  
5 neurological exam findings support the infantile CP diagnosis, with weakness in  
6 gross and fine motor strength of the upper and lower extremities (Tr. 337).

7 The ALJ rejected Dr. Owens' opinions because (1) her treatment records do  
8 not contain clinical testing or studies to substantiate assessed limitations; (2) she  
9 only saw Faulkner on a semi-annual basis; (3) her opinions are inconsistent with  
10 those of Drs. Hamilton, Garrison and Haynes, and (4) her assessed limitations are  
11 inconsistent with Faulkner's daily activities (Tr. 39).

12 The ALJ erred by stating:

13 "... the undersigned notes that no treating or examining physician has ever  
14 identified any significant functional loss with respect to claimant's cerebral palsy,  
15 which significantly limits her ability to perform basic work activities." (Tr. 36).

16 As noted, treating doctor Owens opined generalized weakness from cerebral  
17 palsy and cognitive impairments preclude employment.

18 The ALJ further erred by relying on semi-annual examinations as a  
19 legitimate reason to reject the treating doctor's opinion. It is far from clear that  
there is any effective treatment for either cerebral palsy or BIF. The ALJ is correct,

1 however, that Dr. Owens' records do not contain clinical testing or studies to  
2 substantiate assessed limitations, and this is a legitimate reason to give the opinion  
3 less weight.

4 The ALJ's next cited reason is that Owens' opinions are inconsistent with  
5 those of Drs. Hamilton, Garrison and Haynes (Tr. 39). The Court notes the ALJ is  
6 required to give more credit to the opinions of treating than examining and  
7 reviewing doctors. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). The Court  
8 notes the ability to perform independent daily living activities on this record is not  
9 a legitimate reason to reject Dr. Owens' opinions. Faulkner's ability to bathe and  
10 play computer games, for example, are consistent with Dr. Owens' opinions.  
11 Finally, Dr. Haynes' testimony that Faulkner's condition is "borderline" for  
12 meeting Listing 11.07 does not directly refute Dr. Owens' opinions, as the ALJ  
13 suggests (Tr. 39). The ALJ's reasons for rejecting Dr. Owens' opinions are not  
14 supported by substantial evidence and contain legal error. Remand for further  
15 proceedings is required.

16 *C. Credibility and lay testimony*

17 Faulkner alleges the ALJ erred when she assessed credibility and failed to  
18 discuss her spouse's testimony. ECF No. 14 at 13-18.

19 *Credibility.* The ALJ found Faulkner less than fully credible because her  
daily activities were inconsistent with the degree of limitation claimed, medical

1 evidence was inconsistent with claimed limitations, she sought little treatment for  
2 both physical and mental problems, and when she received treatment it was  
3 generally conservative and objective findings were consistently minimal (Tr. 37-  
4 38).

5 Faulkner asserts because the ALJ stated at the hearing she was impressed  
6 with the “very credible and sincere person” before her, it was error to then find her  
7 incredible in the written decision. ECF No. 14 at 14, referring to Tr. 77.

8 On remand the ALJ should reevaluate credibility.

9 *Spouse’s testimony.* Faulkner alleges the ALJ erred when she failed to  
10 provide any reasons for rejecting the opinion of her spouse, Brent Faulkner. ECF  
11 No. 14 at 18, Tr. 190-97. She is correct that the ALJ did not discuss his testimony.

12 Lay testimony as to a claimant’s symptoms or how an impairment affects the  
13 claimant’s ability to work is competent evidence that the ALJ must take into  
14 account. *Molina v. Astrue*, 674 F.3d 1104, 1114 (9<sup>th</sup> Cir. 2012) (citations omitted).

15 When an ALJ discounts the testimony of lay witnesses, “he [or she] must  
16 give reasons that are germane to each witness.” *Valentine v. Comm’r of Soc. Sec.*  
17 *Admin.*, 574 F.3d 685, 694 (9<sup>th</sup> Cir. 2009), citing *Dodrill v. Shalala*, 12 F.3d 915,  
18 919 (9<sup>th</sup> Cir. 1993)). It can be rejected if it conflicts with medical evidence. *Lewis*  
19 *v. Apfel*, 236 F.3d 503, 511-12 (9<sup>th</sup> Cir. 2001).

Here, the ALJ failed to mention the lay testimony and so did not give

1 reasons for rejecting it. On remand the ALJ is directed to consider and weigh this  
2 evidence.

3 *D. Step five*

4 Last, Faulkner alleges the ALJ erred at step five by relying on the VE's  
5 response to an incomplete hypothetical. ECF No. 14 at 19-20. This too should be  
6 addressed on remand after reassessing Faulkner's RFC.

7 **CONCLUSION**

8 After review the Court finds the ALJ's decision is not supported by  
9 substantial evidence and contains legal error.

10 **IT IS ORDERED:**

11 1. Plaintiff's motion for summary judgment, **ECF No. 14**, is granted. The  
12 case is reversed and remanded pursuant to sentence four for further administrative  
13 proceedings.

14 2. Defendant's motion for summary judgment, ECF No. 19, is denied.

15 The District Executive is directed to file this Order, provide copies to  
16 counsel, enter judgment in favor of plaintiff, and **CLOSE** the file.

17 DATED this 5th day of January, 2015.

18 *s/James P. Hutton*

19 JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE